IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 255.

GERHART EISLER, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

NATIONAL LAWERS GUILD,
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STATEMENT.

The National Lawyers Guild is a bar association with membership throughout the United States. Its constitution proclaims it to be a "professional organization which shall function as an effective social force in the service of the people to the end that human rights shall be regarded as more sacred than property rights." It is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people."

The issues herein presented are imbued with grave implications affecting the fundamental freedoms and immunities guaranteed by the Constitution. The National Lawyers Guild believes that the denial of certiorari in this case would leave unreviewed a decision which makes a vital departure from the constitutional principles established by

this Court, and would destroy protection heretofore afforded to our basic democratic institutions and the civil rights and liberties of all the people. For these reasons, it has secured the consent of the parties to the filing of this brief as amicus curiae.

Although this case presents many important and substantial questions, with which this bar association is vitally concerned, this brief will confine itself to the sole question:

> Did the trial court err by failing to disqualify itself upon the filing of the affidavit of bias and prejudice?

A fair trial is the *sine qua non* of American jurisprudence. Such a trial cannot take place before a prejudiced judge. If the statute permitting a party to file an affidavit of bias and prejudice is to be construed in accordance with the view of the majority of the court of Appeals in this case, the assurance of a trial before an unprejudiced judge intended to be provided by it, will be largely destroyed. Upon an issue of such transcendant significance it is our view that this Court should provide the fullest guidance.

SUMMARY OF ARGUMENT.

The allegations set forth in the affidavit of prejudice gave rise to a fair inference of bias and prejudice. The statutory requirements were complied with and it was error for the trial court not to disqualify itself. Such a statute demands a liberal construction.

ARGUMENT.

The Court Erred in Failing to Disqualify Itself on the Ground of Personal Bias and Prejudice.

The affidavit of prejudice averred *inter alia* that the trial Judge while employed in the Department of Justice, was assigned to the Federal Bureau of Investigation; that his duties were concerned especially with the investigation by the latter into the activities of aliens and communists, (the

defendant being in both of these categories); and that he had been the active legal advisor to the investigator in the very investigation upon which the defendant was subsequently tried.

The Court of Appeals held in another case that the same trial judge should have disqualified himself on a virtually identical affidavit (*Barsky* v. *Holtzoff*, April Term, 1947, Misc. 126, U. S. App., D. C., decided June 11, 1947). We share fully the view of Mr. Justice Prettyman that the legal sufficiency of the affidavit itself, is clear. Under the circumstances alleged it is certainly reasonable to infer the bias and prejudice of the trial judge. To compel one accused to proceed to trial before a judge thus reasonably challenged is to injure the confidence the people must have in the impartiality of our judicial system.

Only the naked question remains open, as to whether the statute should be so narrowly construed as to treat the affidavit as a nullity on the grounds of untimeliness. In our view such a construction would defeat the Congressional intent.

Only eight days elapsed from the time defendant's counsel were first advised that Justice Holtzoff would preside at the trial to the filing of the affidavit. The statute requires the filing of the affidavit 10 days before the term of court. This is obviously upon the assumption that the identity of the trial judge is known for a reasonable period of time more than ten days before the beginning of the term. Since the District Court for the District of Columbia is in continuous session, the only practical way to give effect to the statute is to allow a reasonable time after counsel knows or should know of the identity of the trial judge. It is clear from the record that the affidavit here was filed with all due diligence, considering the facts and circumstances of this case.

This Court said in the Berger case (255 U. S. at 35, 36), "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." If the legal sufficiency of the

affidavit be granted, the interests of justice require the judge challenged not sit unless unless the most compelling reasons of justice make it necessary that he shall do so. This means that such disqualifying statutes must receive the most liberal construction. Such construction will not lead to abuse, for, as this court said in the Berger case (supra—at page 35), "what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside." Only one trial court can be so challenged.

Because of the eloquent statement of the high public interest in the issue here discussed we quote from the opinion of a lower State Court:

> "In the administration of justice it is not only requisite that a judge should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of a judge to render a righteous judgment but it is of transcendent importance to the litigants and the public generally that there should not be the slightest suspicion as to his fairness and integrity. Caesar demanded that his wife should not only be virtuous but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our Government.
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> "Disqualifying statutes should not receive a technical or strict construction but should be interpreted liberally." *The People ex rel. Union Bag and Paper Corporation* v. *Perry M. Gilbert et al.* 142 Misc. (N. Y.) 287.

It is due to the decisive importance of an impartial Court to the true administration of justice that the National Lawyers Guild deemed it essential to intervene in this case. If the Court's own view of its subjective state of impartiality can be a factor in determining whether or not a trial Court shall disqualify itself upon the filing of an affidavit of prejudice pursuant to the statute, then the salutary effect of the statute is bound to be defeated. For it is precisely the Court which is prejudiced that is most likely to

decide that the affidavit is not filed in good faith, or that the inferences logically drawn from its allegations, are unfounded.

Particularly in the present period, with the ever increasing intensity of anti-communist hysteria utmost vigilance and care must be exercised that such hysteria is not allowed to permeate into the court room and affect either judge or jury. The disqualifying statute under consideration here can serve as some protection against this danger, if if is liberally construed. If the construction applied to the statute by the Court below is allowed to stand, by the denial of a writ of certiorari, or otherwise, this safeguard of the most fundamental right to a fair trial will become all but meaningless. In that event the confidence of the people in the integrity of our judicial system may well be impaired. For these reasons we believe that the interests of justice require that a writ of certiorari should be granted in this case.

Respectfully submitted,

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